# Nos. 19,373 and 19,374

# United States Court of Appeals

## For the Ninth Circuit

| | |
|---|---|
| JOSEPH A. MAUN, as trustee, 1962 trust for Alys Wunderlich Bachler, TOWN OF WOODSIDE, et al., *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*. | No. 19,373 |
| WILLIAM J. ADAMS and JANET K. ADAMS, et al., *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*. | No. 19,374 |

**Appeal from the United States District Court for the Northern District of California, Southern Division**

## APPELLANTS' BRIEF


WILSON, HARZFELD, JONES & MORTON,
*Attorneys for Town of Woodside.*

AUSTIN CLAPP,
PAUL N. McCLOSKEY, JR.,
McCLOSKEY, WILSON & MOSHER,
626 Jefferson Avenue,
Redwood City, California,
*Attorneys for Appellants, Town of Woodside, Joseph A. Maun, Howell C. Jones, Edith M. Jones, Charles Savage, Ethel M. Savage, William J. Adams and Janet K. Adams.*



FILED
JAN 18 1965
FRANK H. SCHMID, CLERK



PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

IV



V



---

## Table of Authorities Cited

### Cases

## Statutes

## Constitutions



## Ordinances



## Legislative Reports

## Miscellaneous



## Texts

Nos. 19,373 and 19,374

# United States Court of Appeals

## For the Ninth Circuit

| | |
|---|---|
| JOSEPH A. MAUN, as trustee, 1962 trust for Alys Wunderlich Bachler, TOWN OF WOODSIDE, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.* | No. 19,373 |
| WILLIAM J. ADAMS and JANET K. ADAMS, et al., *Appellants* vs. UNITED STATES OF AMERICA, *Appellee.* | No. 19,374 |

**Appeal from the United States District Court for the Northern District of California, Southern Division**

## APPELLANTS' BRIEF

### INTRODUCTION

"For over three centuries the beauty of America has sustained our spirit and enlarged our vision. We must act now to protect this heritage. In a fruitful new partnership with the states and cities the next decade should be a conservation milestone. We must make a massive effort to save the countryside and establish—as a green legacy for tomorrow—more large and small parks, more seashores and open spaces than have been created during any period in our history."

*The President of the United States,* January 4, 1965.

### STATEMENT OF QUESTIONS INVOLVED

Does the AEC have power to determine the character and location of an electric power line used in local distribution or for the transmission of electricity in intrastate commerce?

Does the AEC's lack of power to determine the character and location of an electric transmission line used in local distribution or for the transmission of electricity in intrastate commerce prevent the United States from condemning property for such use at the Commission's request?

---

## I

### JURISDICTION

Jurisdiction of the subject matter of these actions was conferred upon the District Court by 28 USCA Sec. 1358.

Jurisdiction of these appeals is conferred upon this Court by 28 USCA Sec. 1292(b).

---

## II

### STATEMENT OF THE CASE

Plaintiff United States of America instituted two civil actions (in this court, Nos. 19373 and 19374) for the condemnation of a strip of land, 100 feet in width and approximately 2½ miles long, for the purpose of

constructing thereon an overhead 220,000 volt electric transmission line to serve the Stanford Linear Accelerator Center.

In No. 19373, the government sought to condemn 4.92 acres of the route located within the Town of Woodside; in No. 19374, 24.57 acres of the route through unincorporated lands of the County of San Mateo.

Various defendant property owners and the Town of Woodside filed answers, motions to dismiss and/or motions for summary judgment. The government filed motions to strike the defendants' motions and all defenses raised in their respective answers. Pursuant to stipulation, the two cases were consolidated and all issues submitted to the court on June 5, 1964. At such hearing it was further stipulated that all factual matters raised in support of defendants' motions for summary judgment would be considered as raised by way of answer.

Plaintiff's motions to strike were granted on June 12, 1964, the order being thereafter amended on June 17, 1964, to include a finding intended to bring such order within the provisions of 28 USCA Sec. 1292(b) providing for appeals from interlocutory orders in certain cases. Petitions for leave to appeal were filed, and granted by this Court.

Appellants, including the Town of Woodside, appeal from the order granting plaintiff's motions to strike their motions and defenses and from denial of their motions for summary judgment.

From the pleadings and affidavits of defendants, unchallenged by the government, it appears that the Atomic Energy Commission (AEC) filed the condemnation actions in question for the express purpose of overriding local regulation of the transmission of electricity by the Town Council of the Town of Woodside and the Board of Supervisors of the County of San Mateo.

The defenses of defendants were predicated on the contention that the Atomic Energy Commission was without jurisdiction or power to override local regulation of electric transmission lines by virtue of the Federal Power Act of 1935, and Title 42 USCA, Section 2018, originally enacted as Section 271 of the Atomic Energy Act of 1954. Section 2018, entitled "Agency Jurisdiction," reads as follows:

> "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power."

Construction of the Stanford Linear Accelerator was approved by Congress in 1961[1] at an estimated cost of $114,000,000. The power supply for the Accelerator was to come from an electric transmission line constructed by Pacific Gas and Electric Company (P. G. & E.) *to* the Accelerator.[2]

---

[1]Public Law 87-315; 75 Stat. 676 §§ 101 and 107, Sept. 26, 1961.

[2]Hearings before the Subcommittee on Research and Development and the Subcommittee on Legislation of the Joint Committee on Atomic Energy (1959):

*At page 421:* "1. Main Feeder. The Pacific Gas and Electric Company has studied the problem of bringing power to the Proj-

On January 10, 1963, the AEC and P. G. & E. entered into a written contract for the supply of power to the Accelerator over a 220,000 volt line to be constructed by P. G. & E. through the Town of Woodside and County of San Mateo.[3] Such contract contained a recital that it was executed under the Atomic Energy Act of 1954, as amended, and that it was subject to the approval and regulation of the California State Public Utilities Commission.[3] AEC Chairman Glenn Seaborg admitted that AEC was "acting as a customer for electrical energy."[4]

The Town of Woodside's zoning ordinance requires, and had for many years, a use permit for power lines of this type.[5] The County of San Mateo had a similar ordinance.[6]

The Town of Woodside is one of four communities surrounding the lands of Stanford University where the Accelerator is situated, all of which have ordi-

---

ect M site. They propose to bring in two lines (one from Los Altos and one from Menlo Park) at a voltage of 66 KV. At the main substation the voltage will be reduced to values suitable for transmission in underground cable."

*At page 470:* "Stanford University proposes to construct a two-mile linear electron accelerator at a site adjacent to the University Campus on Stanford-owned land."

*At page 480:* "1. Main power supply is from a single 110 KV line from the P. G. & E. Monta Vista substation."

[3]Affidavit in Support of Motion to Dismiss, Paul N. McCloskey, Jr. (R. Vol. 1, p. 28.)

[4]Letter of Glenn Seaborg, Chairman of AEC, to Donald Graham, Mayor of Woodside, March 7, 1964, page 1 (Exhibit A, Graham Affidavit, April 14, 1964). (R. Vol. 1, p. 31, 32.)

[5]Woodside Ordinances No. 1959-80, page 17, Sections 10.3(e) and (f); pages 28-29, Section 20.4; filed herein with defendants' Motion to Dismiss, April 13, 1964. (R. Vol. 1, p. 41 et seq.)

[6]Declaration of Donald Graham, Mayor of Woodside, May 22, 1964. (R. Vol. 1, p. 66.)

nances requiring transmission lines to be placed underground.[7]

A California public utility such as P. G. & E., holding a franchise from a municipality, is required to adhere to local ordinances regulating electric transmission lines.

For instance, P. G. & E. holds a franchise from the Town of Woodside[8] and has filed its Rule 15 D(1)(a)[9] with the California Public Utilities Commission, indicating its obligation to comply with applicable ordinances requiring underground construction.

P. G. & E., acting as an agent for the AEC, sought to obtain appropriate use permits for the transmission line from both the Town and County. The permit applications were denied, the local governments requiring that the line be put underground.[10]

A feasible underground route to serve the Accelerator exists through Woodside and the County, and was acceptable to the AEC,[11] provided that the additional

---

[7]Copies of ordinances of Menlo Park, Palo Alto and Los Altos Hills, appended as Exhibits A, B and C to Declaration of Donald Graham, May 22, 1964. (R. Vol. 1, pp. 75-80.) See also map of the Linear Accelerator site and surrounding municipalities. (R. Vol. 1, following p. 80.)

[8]Declaration of Donald Graham, May 22, 1964. (R. Vol. 1, p. 66.)

[9]Exhibit E, Declaration of Graham, May 22, 1964. (R. Vol. 1, following p. 74.)

[10]See Minutes, Board of Supervisors of San Mateo County, April 21, 1964, Exhibit F, 4 pages (following R. Vol. 1, p. 74).

[11]"We are prepared to go along with an underground line notwithstanding the fact that the interests of the project would be better served by an overhead installation," *Letter, Seaborg to Graham,* March 7, 1964. (R. Vol. 1, p. 37.)

construction costs of the underground line were not reflected in charges made by P. G. & E. to the AEC. The California Public Utilities Commission requires that the customer of electric energy bear the increased costs of underground construction (see *City of Walnut Creek v. P. G. & E.,* 60 P.U.C. 223, Jan. 8, 1959, Doc. No. 58551, Case No. 61730). AEC admittedly filed the subject condemnation actions rather than pay the additional charges required by P. G. & E. under existing California law. Thus AEC seeks to achieve by the power of eminent domain what it would otherwise be precluded from doing as a customer for electric energy, i.e., overriding local regulation of electric transmission.

---

## III

**THE AEC DOES NOT HAVE POWER TO DETERMINE THE CHARACTER AND LOCATION OF AN ELECTRIC POWER LINE USED IN LOCAL DISTRIBUTION OR FOR THE TRANSMISSION OF ELECTRICITY IN INTRASTATE COMMERCE.**

**A. Congress has established "a hands-off" policy with respect to local regulation of electricity.**

In *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.,* 273 U.S. 83 (1927) the Supreme Court had excluded the states from the regulation of interstate commerce in electricity.

Congress acted in 1935 to resolve the problem thereby created, enacting the Federal Power Act. Section 201(a) of the Act specifically declared that federal regulation was to extend only "to those matters

which are not subject to regulation by the States." (Title 16 USCA, Section 824(a).)

Section 824(b) provides, in pertinent part, as follows:

> "The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission [Federal Power Commission] shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electricity in intrastate commerce . . .*" (Emphasis added.)

The effect of this legislation has been characterized as follows:

> "The Federal Power Act rests upon the concurrent powers of the Federal and state governments . . . The Act clearly indicates that Congress in an attempt to wipe out 'twilight zones' intended to *supplement* rather than supplant state regulation. Federal regulation was extended to that part of the electric power business 'which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.' Reserved to the states was the power not only to control intrastate sales, but also to regulate those interstate aspects of the

power industry which did not require uniform national regulation . . ."

*Electric Power and Government Policy,* The Twentieth Century Fund, 1948, pp. 82-83.

Thus, where the original sale of electric energy for interstate transmission was under federal control, and no other state was affected in any way by regulation of the subsequent transaction, the California Public Utilities Commission could regulate such subsequent transaction and the Federal Power Commission had no authority to do so.

*Southern California Edison Co. v. Federal Power Commission* (CA 9, 1962), 310 Fed. 2d 784, c. den. 372 U.S. 958, 10 L. Ed. 2d 11, 83 S. Ct. 1014.

Thus, by 1954, a clear pattern of supplemental federal, state and local regulatory jurisdiction had been established, subject to continuing definition by the courts in areas of overlap.

**B. In 1954, in the course of an extensive amendment of the Atomic Energy Act of 1946, Congress found occasion to reaffirm its electric power policy.**

It did so by inserting the following provision:

"Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power." (42 USCA, Sec. 2018.)

It is to be noted that this provision was placed in a portion of the amendatory act entitled *"Agency Jurisdiction."*

Section 2018 of Title 42 was not contained in the original bill to amend the AEC Act of 1946, either in the House, H.R. 8862, introduced on April 15, 1954, or the Senate, S. 3323, introduced on April 19, 1954.

It first appeared in a Committee Print on May 21, 1954, entitled "Draft in Bill Form Incorporating Changes Proposed to be Made in H.R. 8862 and Companion Bill S. 3323." The language was exactly the same as was finally enacted as Section 271, but it was there identified as Section 5.

The Joint Committee on Atomic Energy submitted its Report on the bill to the Senate on June 30, 1954. At page 779 of Vol. 1, the Report states:

> "Section 271 preserves the regulatory power of any appropriate agency with respect to the generation, sale, or transmission of electric power."

See

> (House Report No. 2181, Senate Report No. 1699, 83rd Congress, 2nd Session, see page 3487, 2 US Code Congressional and Administrative News.)

The following remarks are taken from *Legislative History of the Atomic Energy Act of 1954,* Volume III, 1955, commencing at page 3834:

> "Mr. Hickenlooper. What section 271 does is to make clear that this act does not interefere in any way with the jurisdiction of the Federal Power Commission over such activities or with State agencies where they have jurisdiction, or with local agencies where they have jurisdiction.

"It is not an authority given in a negative way. *It is a positive negation of any intent by this statute to interfere with* the existing laws and *the existing authorities, State and Federal, that have to do with electricity.* (Emphasis added.)

. . .

"We do not back into it. We are very careful in this bill not to attempt to write into it affirmative law which may have to be interpreted by the courts, but merely to say that the present existing authority shall not in any way be interfered with in the regulation of interstate transmission of electric energy, in that general field. We make it very clear that we do not disturb existing law.

"If the Senator will indulge me for a moment, I will say this: There is a reason for saying it this way, as we have said it in the bill. Every time a State legislature or the United States Congress passed (sic) a bill on a subject, giving affirmative relief or containing affirmative provisions, that new legislation is bound to be subject at some time or other to interpretation as to what it means. Does it mean to change? Does it mean to alter? Does it create any new situations?

"We have attempted in this bill to eliminate such questions as that by merely saying the existing authority for the regulation of the flow of interstate power—whatever those regulations may be or whatever the authority which now exists in the Federal Power Commission is—remains the same.

. . .

". . . The Federal Power Act refers to the wholesale distribution under the Federal Power Com-

mission; and the local distribution, so far as I know, is under the jurisdiction of the local regulatory body, either the State or municipal or other regulatory body.

. . .

". . . We say that nothing in this act shall interfere with or affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power. We say that this act does not interfere with the rights and the power and the authority of any Federal, State or local regulatory body whatever; and the power and the authority which may be there now for the transmission of electricity or the generation of electricity or whatever the authority may be is not changed.

. . .

"There was a move on the part of the committee to put this section 271 in the bill as a safeguard and as an assurance that the existing authority of the Federal Power Commission or the Federal law or agency and the existing authority of local agencies, and the existing authority of the State agencies, whatever they may be in connection with the transmission of electric energy, would not be disturbed or interfered with in any way."

While the particular threat of dislocation of the pattern of existing authority arose out of permission given by the same act to AEC to generate and distribute electric power produced by the use of atomic means, it is clear that Congress was satisfied with, and intended to continue, undisturbed, existing state and local authority over all electricity, including that produced by atomic means.

It is clear that regulation of the transmission of electricity involves the power to determine the location and character of transmission lines. It is equally clear that no ordinary customer for electricity would be permitted to build a transmission line in defiance of such regulations.

**C. In context AEC's position is that of a mere customer for electricity who must pay such a price for the desired commodity or service as is charged to other consumers of comparable size determined by relevant factors of cost and profit, including, where applicable, local regulation.**

In determining the price to be charged any customer of electricity, the capital investment for transmission facilities is a necessary consideration. Before calculating a profit in terms of "fair return" upon investment, the size of the investment would be determined by questions of operational safety[12] and right-of-way location.[13] A California public utility must

---

[12]The California Supreme Court has recognized the hazards of an overhead 220,000 volt line such as the AEC plans to build. In *P. G. & E. v. Hunt Estate Co.*, 49 Cal. 2d 565, at p. 572, the Court said:

> "A reasonably foreseeable hazard to be created in stringing a 220,000 volt power line for more than 3 miles across one's land is manifestly a proper item to be considered in determining the damage to the property, not only to the land underlying the easement, but also to all the land which conceivably might be affected by the hazard . . ."

[13]In *Report to the Joint Committee on Atomic Energy*, "Background Information on the High Energy Physics Program and the Proposed Stanford Linear Accelerator Project" (1961), the following item appears at page 333:

> "Item C3, *Utilities*, shows an increase, attributable to both escalation and design changes. Item (a), Pacific Gas and Electric Company powerline, has almost doubled in cost due to rapidly-increasing right-of-way costs . . ."

locate its transmission lines in a manner compatible with the greatest public good and least private injury.[14]

That the denial of an overhead 220 KV line is reasonable, as well as consistent with the pattern of development in the State of California as a whole, is evidenced by the following excerpt from a recent decision of the California Public Utilities Commission:

> "It is clear, particularly in a State such as California where unplanned suburban expansion, coupled with our population explosion, may quickly result in a depletion of all scenic attractions, the citizenry must become more and more vocal in their desire to maintain their native landscape . . . The ever-growing and oft-expressed desire of more and more Californians for green space conservation should be acknowledged by California public utilities in their planning."
>
> *Ligda et al. v. P. G. & E.,* Case No. 7587, May 7, 1963.

The developing trend of local underground utility ordinances is evidenced by comparing the findings of fact and decision in *City of Los Angeles v. City of Huntington Park,* 32 CA 2d 257 (1939) with the recent decisions of *Long Island Lighting Company v. Shields,* 190 Misc. 797, aff'd 274 App. Div. 803, aff'd 299 N.Y. 562 and *Town of Hamilton v. Department of Public Utilities,* 190 N.E. 2d 545.

In the 1939 California case, the court found, with respect to proposed underground construction of 275,000 volt lines,

---

[14] *California Code of Civil Procedure,* Section 1241 (2).

> ". . . that underground construction of said lines would be impracticable . . . for the reason that the use of underground cables for high voltage transmission lines has not yet developed to a sufficient extent that they may be said to be beyond the experimental stage."

By 1962, underground high voltage transmission lines were commonplace in urban areas, and in *Town of Hamilton v. Department of Public Utilities, supra,* at p. 553, it was said:

> "It is appropriate for municipalities, even in the absence of guiding or controlling legislation, to plan to improve and beautify their central areas and public ways and to maintain the natural beauties of villages and rural areas. That overhead wires have been tolerated in many of the towns, cities, and countrysides of the United States (as they are not in all parts of the world) does not mean that the increased costs of accommodating a line to such may not be justified."

Mr. Justice Douglas of the United States Supreme Court, in commenting recently on the very overhead line from which the AEC proposes to take its power, said:

> "On a recent visit to California I was shocked to see the green rolling hills that make up the Coast Range being marred by huge towers carrying power lines. Why should not the power be transmitted by buried cables? It would cost more to do it that way. But what about the aesthetic values? Are they not worth enough to be preserved at almost any cost? Ugliness is not an inevitable cost of modernity."
>
> *Ladies Home Journal,* July, 1964, page 40.

At all stages of the planning and construction of the Linear Accelerator project, prior to the filing of these actions, AEC had conceded that it was "merely a customer for electrical energy." (Statement of the Case, *supra,* pp. 3, footnote 4.)

The AEC's position in this case is nearly identical to the government's position in *U.S. v. Oklahoma Gas and Electric Co.,* 297 Fed. 575, where the federal government had contracted with a public utility for electric power at rates below those later required by the Oklahoma state regulatory agency. The Circuit Court of Appeals upheld the state's right to require the higher rate stating, at page 579:

> "The government was contracting with one of its citizens to do a very common and ordinary thing not in any way relating to or involving its existence, viz, furnish electricity for lighting and motor power at Ft. Reno Remount Depot. We see no reason why as to a contract of this nature the government should occupy any different position than if the same had been made between two of its citizens."

**D. Congressional intent determines whether or not an Executive agency is to bear the burden of locally-determined prices.**

It is true that the United States Supreme Court has sometimes upheld the right of a federal agency to disregard minimum prices fixed by local regulation.

The most recent decision of the United States Supreme Court on this subject is *Paul v. United States,* 371 US 245, 9 L. Ed. 2d 292, 83 S. Ct. 426.

This case involved a conflict between the policy of the United States demanding competition in sales of

commodities to the Armed Forces and the policy of the State eliminating competition in the sale of milk below its prescribed minimum prices.

Even so, the Court carefully examined the statutory exceptions to the policy of competition, and the regulations under the statute, and concluded that the exceptions did not apply. (9 L. Ed. 2d 292, 297-303.) The plain implication of this procedure is, that had the Court found the exceptions applicable, it would have determined the Congressional policy to be that even though the state regulation was a burden, it was to be borne by the government.

Such a determination and such a Congressional policy explained, the Court said, the seemingly opposite opinion of the Court in *Penn Dairies Inc. v. Milk Control Com.,* 318 US 261, 87 L. Ed. 748, 63 S. Ct. 617, dealing with an earlier procurement regulation which ". . . manifested a federal 'hands off' policy respecting minimum price laws of the States . . ." (9 L. Ed. 2d 292, 299, col. 2.)

In other cases, however, the Court has expressly ruled that the burden of additional cost to the government by reason of local regulations would not cause such regulations to be inapplicable. In *James Stewart and Co. v. Sadrakula,* 309 US 94, 84 L. Ed. 596, at 599, the Court required a government contractor to comply with a local safety statute, stating:

> "It is true that it is possible that the safety requirement of boarding over the steel tiers may slightly increase the cost of construction to the government, but such an increase is not significant in the determination of the applicability of

> the New York statute. In answer to the argument that a similar increased cost from taxation would 'make it difficult or impossible for the government to obtain the service it needs,' we said in *James v. Dravo Contracting Co.* (302 US 134, 160; 82 L. Ed. 155, 172) that such a contention 'ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action.' "

In *Public Housing Administration v. Bristol Township,* 146 F. Supp. 859 (D.C. E.D. Penn. 1956) a federal agency sued to enjoin enforcement of a city's stop work order against an electrical contractor working on a public housing project. The Court upheld the city ordinance, stating, at page 863:

> "In applying the supremacy clause of the United States Constitution, Article VI, Clause 2, the task of a court is to determine whether the state or local police power regulation . . . is compatible with the policy expressed in the federal statutes and in the Federal Constitution. An examination of the Lanham Act, as amended, 42 U.S.C.A., Sections 1521-1590, indicates . . . that Congress expressed its intent that projects constructed under this Act 'shall, so far as may be practicable, conform in location and design to local planning and tradition, 42 U.S.C.A. §1545, and that government ownership of the project shall not deprive any state or political subdivision thereof of the civil and criminal jurisdiction . . .' "
>
> "The United States Supreme Court has consistently held that Congress, in enacting legislation within its constitutional authority, will not be

deemed to have intended to invalidate state or local rules for protection of the public safety unless its purpose to do so is clearly stated . . ."

"The United States Supreme Court has construed the language of Article IV, Section 3 of the Constitution [Congress shall have power to make rules re U. S. property] as requiring that the method of disposing of government property 'must be consistent with the foundation principles of our dual system of government and must not be construed to govern the concerns reserved to the states.' *Ashwander v. TVA,* 297 U.S. 288, 338, 565, Ct. 466, 80 L. Ed. 688 . . ."

"The United States Supreme Court has repeatedly stated that the extension of federal control into traditional local fields is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions (citing cases) . . . *the hearing judge believes that Congress did not intend, either by its specific enactments or by its silence, to interfere with the attempts of Bristol Township to require Mr. Branson to secure building permits in this situation so as to safeguard the safety of its citizens from possibly hazardous electric repair work."* (Emphasis added.)

**E. Other portions of the Atomic Energy Act display a Congressional intent to limit closely the powers of the Atomic Energy Commission.**

(1) There is statutory limitation of AEC's powers in certain fields traditionally of local interest.

Section 2018 of Title 42 is not the only section of the Atomic Energy Act of 1954, as amended, which

restricts AEC powers. Congressional desire specifically to preserve state and local regulatory powers was reiterated in the 1959 amendments relating to radiation hazards. (Section 2021 et seq.) After a preamble reciting a desire "to promote an orderly regulatory pattern between the Commission and state governments" with respect to nuclear development (Section 2021(a)(3)), Section 2021(k) was inserted:

> "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes *other than protection against radiation hazards.*" (Emphasis added.)

Congress thus pre-empted the field of protection against radiation hazards, but again indicated the intent to preserve state and local power in other fields related to AEC activities.

The California Supreme Court recognized this in the recent case of *Bodega Head & Harbor, Inc. v. Public Utilities Commission,* 61 A.C. 107, at page 114:

> ". . . it is clear that the federal government has not pre-empted the field, at least with respect to the phase of protecting the public from hazards other than radiation hazards, and that the states' powers in determining the *location* of atomic reactors are not *limited* to matters of zoning or similar local interests other than safety." (Emphasis added.)

That the AEC recognized the limitation inherent in the language of Section 2021(k) is shown by the comment of one of its attorneys, Robert Lowenstein, in discussing the proposed amendment as early as 1957:

"Thus the bill is not intended to restrict the states in the exercise of their responsibilities for *zoning . . .*" (Emphasis added.)

*Symposium, Atomic Energy and the Law,* Berkeley, California, November 14-16, 1957, page 102.

(2) With respect to the authorization for the Linear Accelerator Center, there is evidence in the statutory history that Congressional approval was predicated on the ability to build the center *without* condemnation.

For example, from *Hearings Before the Sub-Committee on Research and Development and the Sub-Committee on Legislation, Joint Committee on Atomic Energy,* 86th Congress, First Session, July 14, 15, 1959, at page 470:

"Stanford University proposes to construct a two-mile linear electron accelerator at a site adjacent to the University Campus on Stanford-owned land. The Stanford proposal is contained in a report prepared by the University staff titled 'Proposal for a Two Mile Linear Electron Accelerator', dated April, 1957."

At page 58:

"Dr. Williams: If I may then proceed, the availability of a site at no cost, located only a few minutes away from the Stanford campus, is particularly fortunate."

**F. In addition to its electric power policy, other policies of Congress are implemented by the local determination against overhead power lines.**

In addition to the specific language of Sections 2018 and 2021(k), taken with the cooperative regulation contemplated in the field of electric power, Congress has likewise enacted positive legislation supporting the purposes of local legislation preserving open spaces and scenic beauty. The underground ordinance of Woodside and other California cities is manifestly founded in part on the principle enunciated by the Supreme Court in *Berman v. Parker,* 348 US 26, 99 L. Ed. 27 at page 38:

> "The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully-patrolled."

The intention of the Woodside ordinance is to preserve and protect a scenic mountainside area, characterized by steep gradients, a thin crust of soil, heavy rainfall, acute erosion problems, fire hazard and stands of redwood trees in excess of 100 years old. See Supporting Affidavit of Janet K. Adams (R., pages 63-65).

Congress has specifically enunciated a federal policy in support of the same goals as the Town of Woodside's underground ordinance in at least two relatively-recent enactments.

Title VII of the Federal Housing Act of 1961 contains sections which are now found in Title 42, Section 1500 et seq., U. S. Code. From Section 1500(b):

> "It is the purpose of this chapter . . . to help provide necessary recreational, conservation, and scenic areas by assisting State and local governments in taking prompt action to preserve open-space land which is essential to the proper long-range development and welfare of the nation's urban areas in accordance with plans for the allocation of such land for open-spaces." (Public Law 87-70.)

With respect to highways, and the recently approved Interstate Defense System (Title 23, U. S. Code, Section 131 et seq.) Congress provided not only for the safety and convenience of public travel, but for its *enjoyment,* declaring:

> "It is declared to be in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to the interstate system . . . it is declared to be a national policy that the erection and maintenance of outdoor advertising signs . . . should be regulated . . .
>
> "The Secretary of Commerce is authorized to enter into agreements with State highway departments . . . any such agreement . . . may include, among other things, provision for preservation of natural beauty, prevention of erosion, landscaping, re-forestation, development of view points for scenic attractions that are accessible to the public without charge . . ." (Section 131.)
>
> "Such contract likewise may include the purchase of such adjacent strips of land of limited width and primary importance for the preservation of

> the natural beauty through which highways are constructed not to exceed 3% of such sums apportioned to a State in any fiscal year in accordance with section 104 of this title may be used for the purchase of such adjacent strips of land without being matched by such State." (Section 319.)

Congress has thus indicated its general approval of the purposes reflected by the Woodside ordinance. Where such general approval exists, the Supreme Court has on at least one occasion upheld a local ordinance which was argued to be in direct conflict with a federal law.

In *Huron Cement Co. v. Detroit,* 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1959) the court upheld a Detroit city smog abatement ordinance which required structural alteration of vessels licensed for interstate commerce. The ordinance was upheld against the usually-accepted contention that the United States had pre-empted the field by its own federal licensing requirements relating to the vessels.

As to the argument that the local ordinance burdened interstate commerce, the court said (4 L. Ed. 2d 852, at p. 857):

> ". . . the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. Congress recently recognized the importance of legitimacy of such a purpose when in 1955 it provided:
>
> '. . . it is hereby declared to be the policy of Congress to preserve and protect the primary

responsibilities and rights of the states and local governments in controlling air pollution.' "

In the case of the Woodside ordinance, the town seeks to protect itself against the hazards and ugliness of overhead power lines. Congress has strongly supported such purposes by affirmative legislation.

Congress intended local agencies to regulate the transmission of electricity and forbade AEC to exercise such power. The exercise of such authority involved power to determine the character and location of transmission lines, and, indirectly, the price of electricity resulting from the exercise of such authority. Congress, by its policy, has consented that AEC, as a customer of electricity, should pay the price so determined.

---

## IV

### THE AEC's LACK OF POWER TO DETERMINE THE CHARACTER AND LOCATION OF AN ELECTRIC TRANSMISSION LINE USED IN LOCAL DISTRIBUTION OR FOR THE TRANSMISSION OF ELECTRICITY IN INTRASTATE COMMERCE PREVENTS THE UNITED STATES FROM CONDEMNING PROPERTY FOR SUCH USE AT THE COMMISSION'S REQUEST.

The power to determine public uses and to authorize a taking is a legislative, not an executive, power. *(Nichols, Eminent Domain,* Sec. 3.15.) The general statute providing for condemnation (40 USCA, Sec. 257) is procedural in nature, and authority to condemn must be found elsewhere *(U.S. v. Kennedy,* CA 9, 278 Fed. 2d 121).

**A. Authority to condemn may be limited by statute.**

The legislature may, of course, limit the power, either in the authorizing statute, (*Puerto Rico Ry. L. & P. Co. v. U.S.,* CA 1, 131 Fed. 2d 491) by requiring approval of some body other than that which seeks to condemn, (*Virgin Islands H & R Authority v.* [*Certain land*] 161 F.S. 475) or in a separate statute (*Maiatico v. U.S.,* C.A.D.C., 302 Fed. 2d 880).

In *Maiatico v. United States,* 302 F. 2d 880 (1962) the General Services Administration sought to condemn a building in the District of Columbia. The defendant argued that the building was not within the "taking area" authorized by Congress, and that the approval of a Congressional Committee had not been obtained, as required by statute. The government relied on a Supplemental Appropriations Act which provided:

> "Appropriations under the heading 'Construction, Public Building Projects' shall be available for (1) acquisition of buildings and sites thereof by purchase, condemnation or otherwise . . ."

The district court denied defendants' motion to dismiss, but the circuit court reversed, stating, (at page 885):

> "The government would have to say that the general provision of the Second Supplemental Appropriation Act supplants the limitations of the Public Buildings Act of 1959 and the Appropriations Act which had so carefully been linked to the former. Carried to its logical conclusion, the Governments' construction would sweep away all pre-existing requirements. Any such inversion of

> the purpose of Congress would be in direct conflict with the governing principle to be applied here. 'However inconclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208; 52 S. Ct. 322; 76 L. Ed. 704. The general provision, at least as applicable to the acquisition of property in the District of Columbia, can not be seen to repeal the special legislation which Congress with great care had specified as governing here."

In the case at bar, pre-existing provisions of the Federal Power Act, re-affirmed in the Atomic Energy Act itself (42 USCA, Sec. 2018) necessitating the approval of the character of power lines by state regulatory agencies, control any general authorization to A.E.C. apparently permitting it to exercise the right of eminent domain.

**B. Authority to condemn may be limited by constitutional provisions.**

The right to own and hold property, even against the government, is constitutionally protected by the prohibition against its taking except for a public use.

*U. S. Constitution, Amendment V.*

Involved in the regulation of electric power is authority to determine the character and location of transmission lines. Approval of a proposed line is a determination that a line, so located, is a public use.

Disapproval of the location of a proposed line of a proposed character is a determination that such a line, so located, is not a public use.

By its overall restraint in the field of electric power, as to generation and distribution as well as transmission, Congress has left the questions of public use in these fields to state and local determination. The Town and County legislative bodies have determined that a power line in the area condemned would *not* be a public use. How, then, can the AEC, restricted in its jurisdiction by 42 *USCA,* Section 2018, from affecting local regulations, declare that a power line in the same area *is* a public use?

The court has the power to determine whether the use for which private property is authorized to be taken by the governmental agency is, in fact, a public use.

*Shoemaker v. United States,* 147 U.S. 282, 298.

In the case at bar, this fact is to be determined by finding whether or not the proposed line has been approved as to location and character by the local bodies engaged in the regulation of the transmission of electricity.

## V

### CONCLUSION

AEC's lack of authority to determine the character and location of an electric power transmission line has been demonstrated in point III, supra (p. 5 et seq.).

Such authority as AEC has to take property by eminent domain has, in the case at bar, (1) been limited by the statutes expressing Congressional policy with respect to power regulations, preservation of natural resources, and regulation by local agencies of activities for purposes other than protection against radiation hazards, or (2) by the Constitution of the United States, Amendment V, following a determination by local agencies, pursuant to Congressional policy, that AEC's proposed power line is not a public use.

If these defenses appeared as a matter of law, from the allegations of the complaints, appellants' motions to dismiss should have been granted. If they appeared from the materials in support of the motions for summary judgment, those motions should have been granted. In any event, appellants' motions and pleaded defenses, involving these matters, should not have been stricken.

The orders of the District Court appealed from should be reversed with directions to render judgment for appellants.

Respectfully submitted,

AUSTIN CLAPP,

*Of Counsel for Appellants.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

AUSTIN CLAPP,
*Attorney for Appellants.*